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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/040,046	10/19/2001	John B. Taylor	396542	1834

7590

04/18/2003

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EXAMINER

LEVY, NEIL S

ART UNIT

PAPER NUMBER

1616

DATE MAILED: 04/18/2003

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Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10 040046

Applicant(s)

Taylor

Examiner

N/B/C/Guy

Group Art Unit

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—The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address—

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).

**Status**

- ☒ Responsive to communication(s) filed on 9/10/02
- ☐ This action is **FINAL**.
- ☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 1 1; 453 O.G. 213.

**Disposition of Claims**

- ☒ Claim(s) 1-54 is/are pending in the application.
- Of the above claim(s) 3-14 is/are withdrawn from consideration.
- ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- ☒ Claim(s) 1, 2 is/are rejected.
- ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- ☒ Claim(s) \_\_\_\_\_ are subject to restriction or election requirement.

**Application Papers**

- ☐ See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.
- ☐ The proposed drawing correction, filed on \_\_\_\_\_ is ☐ approved ☐ disapproved.
- ☐ The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.
- ☐ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. § 119 (a)-(d)**

- ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).
  - ☐ All ☐ Some\* ☐ None of the CERTIFIED copies of the priority documents have been received.
  - ☐ received in Application No. (Series Code/Serial Number) \_\_\_\_\_.
  - ☐ received in this national stage application from the International Bureau (PCT Rule 1 7.2(a)).

\*Certified copies not received: \_\_\_\_\_

**Attachment(s)**

- ☒ Information Disclosure Statement(s), PTO-1449, Paper No(s). 46
- ☒ Notice of Reference(s) Cited, PTO-892
- ☐ Notice of Draftsperson's Patent Drawing Review, PTO-948
- ☐ Interview Summary, PTO-413
- ☐ Notice of Informal Patent Application, PTO-152
- ☐ Other \_\_\_\_\_

**Office Action Summary**

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Receipt is acknowledged of original Reissue application declaration signed ~~by~~ on 10/19/01 by Patentee, and the Reissue declaration by assignee of 5/8/02 signed by President Ferrell, Supplemental Ids of 6/17 and 9/10, 2002, and Protest of 7/25/02. Some references were undated and therefore not considered.

Newly submitted claims 3-14 are directed to an invention that is independent or distinct from the invention originally claimed and examined in parent application 09/109,139. Applicant cancelled the method claims now presented prior to examination of the parent application. These claims constitute a patentably distinct invention, requiring search in class 504, subclass 101, constituting a burdensome additional search and examination

Since applicant cancelled the method claims from the originally patented application, the composition claims 1-2 have has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 3-14 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03. The methods are not seen as within the scope of grounds for Reissue under 35 U.S.C. 251 (M.P.E.P 1402 and 1450).

The original patent, or a statement as to loss or inaccessibility of the original patent, must be received before this reissue application can be allowed. See 37 CFR 1.178.

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

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Claim 1 is rejected under 35 U.S.C. 251 as being based upon new matter added to the patent for which reissue is sought. The added material, which is not supported by the prior patent, is as follows: substitution of "ALKYNYL" for "alkinyl" was not supported. The issue of substitution for "ALKINYL" was raised as a 2<sup>nd</sup> paragraph issue in parent prosecution, and the term alkinyl stood as originally filed. If there is an issue of inoperativeness of the patent in regard to this term, it has not been explained and supported. Neither term Alkinyl nor Alkynyl has been shown to be exemplified or supported, any where in the specification. This is not seen as a basis for correction of a defective specification, as is required under 35 US 251. Further, if the correction proposed is merely correction of a spelling error, it is not an error "of substance" correctable by reissue.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 2 are rejected under 35 U.S.C. 102(b) as being anticipated by Fenn et al '84.

This article cited in Protest under 37 CFR paragraph 1.291 – public protect, provides the instant composition as it is claimed; see p.608, growth in liquid culture.

The liquid contains  $H_3 PO_3$  and  $KH_2 PO_4$ ; in aqueous solution. Consequently one would find a mix of all species of the instantly claimed K cation salts, and at the amounts claimed. Since the mix provides for antifungal activity, the crop growth would

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be stimulated. One would also find stimulation of growth as the composition inherently provides this as a function of the environment in which it is placed; However, it is the composition which is claimed, no patentable weight given to future intended use.

Claims 1, 2 are rejected under 35 U.S.C. 102(b) as being anticipated by Dolan et al '88.

Dolan also mixed potassium phosphate in (p.977) water with phosphorous acid and Fosetyl – Fosetyl breakdown would provide Ca, as well (p.974) as the K from potassium phosphate.

Claims 1, 2 are rejected under 35 U.S.C. 102(b) as being anticipated by Griffith et al '93.

Griffith mixed K phosphate, KOH, and a phosphate source (p.2110-chemicals). See Fig 3; 1mm phosphonate was shown with a range of 0:01 to 1mm phosphate.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 2 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Alette WDG-1990.

The label instructs use of aqueous formulation as fertilizer of Aliette, Al tris O-ethyl phosphonate with weight/weight ratio of DiAmmonium phosphate. This is the instant invention as claimed.

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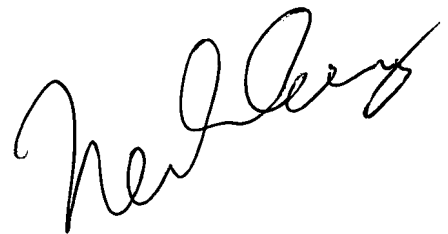
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Neil Levy whose telephone number is (703)308-2412.

The examiner can normally be reached on Tuesday through Friday 7 AM to 5:30 Pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jose Dees can be reached on (703) 308-4628. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 308-4556 for regular communications and (703) 872-9307 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1235.

Levy/LR  
April 17, 2003

A handwritten signature in black ink, appearing to read "Neil S. Levy", with a stylized, cursive script.

**NEIL S. LEVY**  
**PRIMARY EXAMINER**